Supreme Court, U.S.
FILED
04 877 DEC 21 2004

No.

IN THE
SUPREME COURT OF THE UNITED STATES

PATRICIA DONAHUE, et al.,

Petitioners,

v.

PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM OF THE COMMONWEALTH OF PENNSYLVANIA, et al.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

---

PETITION FOR WRIT OF CERTIORARI

Cletus P. Lyman*
Michael S. Fettner
LYMAN & ASH
1612 Latimer Street
Philadelphia, PA 19103
(215) 732-7040
* *Counsel of Record*

QUESTION PRESENTED

Does an amendment to two Pennsylvania public retirement systems (one for teachers, the other for state employees) violate the Equal Protection clause of the Fourteenth Amendment to the US Constitution, where the amendment distributes benefits unequally, discriminating against members who retired before July 1, 2001, by failing to increase their annuities by 25%, and conferring benefits on later retirees, including legislators who granted themselves a 50% increase?

PARTIES TO THE PROCEEDINGS

Petitioners are plaintiffs Patricia Donahue and Madeleine F. Pierucci, retired professional employees of school districts in Abington and Philadelphia, Pennsylvania.

Respondents are:

Public School Employees Retirement System of the Commonwealth of Pennsylvania ("PSERS"), established in 1917 to provide retirement benefits to public school employees of Pennsylvania. Board of Trustees of the Public School Employees Retirement System of the Commonwealth of Pennsylvania ("PSERS Board"), the governing board of PSERS.

State Employees' Retirement System of the Commonwealth of Pennsylvania ("SERS"), established in 1923 to provide retirement benefits to state employees. Board of Trustees of the State Employees' Retirement System of Pennsylvania ("SERS Board") is the governing board of SERS.

Barbara Hafer is the Treasurer of the Commonwealth of Pennsylvania and Chair of the Board of Trustees of PSERS. The state treasurer by statute is the custodian of PSERS and SERS and makes all payments from the funds.

Nicholas J. Maiale is the Chair of the Board of Trustees of SERS.

DISCLOSURE STATEMENTS

Statement under Rule 29.6:

None of the parties to these proceedings is a corporation.

Statement under Rule 29.4(a):

None of the parties to these proceedings is the United States or any department, agency or officer thereof.

Statement under Rule 29.4(c):

A statute of Pennsylvania is drawn into question; departments and officers of the state are parties hereto; and, the Attorney General of Pennsylvania is counsel for respondents. No separate notification under Rule 29.4(c) is required. Pursuant to Rule 29.6, none of the parties to these proceedings is a corporation.

TABLE OF CONTENTS

Question Presented	i
Parties to the Proceedings	ii
Disclosure Statements	iii
Table of Contents	iv
Table of Authorities	v
Opinion and orders below	1
Jurisdiction	1
Constitutional Provision Involved	2
Statement of the Case	2
Procedural History	3
Place of raising federal question	4
Statement of Facts	5
Reasons for Granting Writ	7
Conclusion	14
Appendix:	
9/22/04, order	A1
10/21/03, opinion	A2

TABLE OF AUTHORITIES

Cases:

Hooper v. Bernalillo County, 472 US 612 (1985) 7,12,13

Romer v. Evans, 517 US 620 (1996) 13

Zobel v. Williams, 457 US 55 (1982) 7,12,13

US Constitution:

Fourteenth Amendment 2

Pennsylvania Statutes:

24 Pa.C.S. §§ 8101-8535 2

71 Pa.C.S. §§ 5101-5956 2

Act of May 17, 2001, P.L. 26 ("Act 9") 2,5,8,13

OPINION AND ORDERS BELOW

The opinion of the Commonwealth Court of Pennsylvania is reported at 834 A.2d 655 (2003)[A2]. The order of the Supreme Court of Pennsylvania is reported at 858 A.2d 1162 (Pa. 2004)[A1].

JURISDICTION

The judgment of Commonwealth Court of Pennsylvania was entered October 21, 2003 [A2]. The judgment of Supreme Court of Pennsylvania was entered September 22, 2004 [A1].

This court has jurisdiction over this case under 28 USC § 1257(a), because it involves review of a final judgment of the highest court of a state in which a decision could be had, where the validity of a statute of Pennsylvania is drawn into question on the ground of its being repugnant to the Constitution of the US.

The Supreme Court of Pennsylvania had jurisdiction over this action pursuant to 42 Pa.C.S.A. § 723(a), granting jurisdiction of appeals from final orders of the Commonwealth Court in matters originally commenced in the Commonwealth Court.

The Commonwealth Court of Pennsylvania had jurisdiction over this action pursuant to 42 Pa.C.S.A. § 761, granting jurisdiction to Commonwealth Court over actions where Commonwealth parties are respondents.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Fourteenth Amendment:

"Section 1. * * * nor shall any State deprive any person . . . ; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Nature of Action

This is a class action on behalf of retirees before July 1, 2001, to declare amendments to two Pennsylvania retirement systems unconstitutional, to the extent they discriminate against petitioners and others who retired before July 1, 2001, and to obtain an increase in their annuities and other remedies. 2001 amendments to Public School Employees' Retirement Code, *24 Pa.C.S.* §§ *8101-8535*, and State Employees' Retirement Code, *71 Pa.C.S.* §§ *5101-5956*, Act of May 17, 2001, P.L. 26 ("Act 9").

Act 9 distributes benefits unequally: it discriminates against members of the retirement systems who retired before July 1, 2001, by failing to increase their annuities by 25%, whereas it increases annuities by 25% to those members who retire on or after July 1, 2001.

Act 9 discriminates against all members by increasing the annuities of legislators who enacted Act 9, by 50%.

Procedural History

On May 16, 2003, petitioners filed and served their petition for review.[1]

On June 18, 2003, respondents filed their preliminary objections, demurring to the petition on the ground that Act 9 involves economic interests and that lack of uniformity of pension benefits survives rational basis review, and challenging the standing of petitioners, as retired teachers and members of PSERS, to represent retired state employees, who are members of SERS. PSERS, SERS and their boards of trustees demurred additionally on the ground that they were not proper parties on at least one legal theory.

On August 1, 2003, respondents filed their brief in support of preliminary objections. Respondents identified the following "rational basis" for Act 9's unequal distribution of benefits:

> "Although not expressly set forth in the findings of the Act, it is clear that the increase in benefits was enacted, as with any increase in salary or benefits, to retain and attract the most qualified candidates to

---

[1]On May 19, 2003, petitioners filed and served a second petition for review, clarifying that Nicholas J. Maiale is named in his capacity as chair of the board of trustees of SERS (in the caption), and that the boards of trustees of PSERS and SERS and Ms. Hafer and Mr. Maiale were named in their official capacities. The prothonotary consolidated the two actions, and the May 19, 2003, petition was considered operative.

public school and state employment."

On September 2, 2003, petitioners filed their brief in opposition to preliminary objections, with accompanying volume of appendices. Petitioners showed that Act 9 was not to retain or attract employees, but that it was anti-retentive. The legislative history assumed retirements would double in the year following enactment.

On October 21, 2003, the Commonwealth Court filed an opinion and order sustaining preliminary objections and dismissing the petition [A2].[2] Friedman, J., filed a concurring opinion; and, Smith-Ribner, J., concurred in the result only.

On November 12, 2003, petitioners filed their notice of appeal to the Supreme Court.

On September 22, 2004, the Supreme Court affirmed Commonwealth Court, without opinion [A1].

Place of raising federal question

The federal equal protection question involved was raised by petition for review of Act 9 and preliminary objections of respondents; was addressed in the briefs of the parties; and, was decided by the Commonwealth Court [A2].

---

[2]Petitioners made claims under the Pennsylvania Constitution, not raised in this petition.

Statement of Facts

Petitioners are retired professional employees of the school districts in Abington and Philadelphia, who retired in 1999 and have been receiving retirement annuities from PSERS since. Ms. Donahue taught for 37 years, Ms. Pierucci taught for 31 years. Petitioners contributed to PSERS all the years they taught in the Commonwealth, and contributions were made on their behalf by their School District employers as part of their compensation. Ms. Donahue also contributed to PSERS for three years she taught outside the Commonwealth.

Amounts of retirement annuities are calculated as a percentage of the average of the highest three years of salary paid to persons while in active employment with a public school district or the Commonwealth. The percentage is determined by multiplying the retirees' years of service by a statutory multiplier. At the time of petitioners' retirements, the multiplier was 2.

Act 9 increased the multiplier used to calculate annuities from 2 to 2.5 for persons retiring on or after July 1, 2001. This had the effect of increasing their annuities by 25%. The multiplier was not changed for persons who retired before July 1, 2001.

There was an exception to the change in the formula for calculating annuities: members of the legislature increased their annuities by 50%.

The stated purpose of Act 9 is [Section 1(2)]:

"Over the past two decades, both pension funds have experienced investment returns well in excess of expectations. As a result, state and school district contributions have decreased dramatically to less than 1% of payroll for the next year. At the same time, employee contributions range from 5% to 6.25% of payroll. The outstanding investment performance has resulted in pension funds being over 123% funded, compared to current needs. The 4% statutory interest rate the employees receive on their pension accounts has consistently been eclipsed by the actual average returns of the funds over the last two decades, and also has been less than available private market interest rates. The fact that employees have been and are projected to continue to contribute at a rate that is materially greater than the employers due to the more than 100% funded status of the plans, raises the issue of the extent to which employees should be provided additional benefits. The increase in benefits for state and school employees provided herein will in effect allow them for the first time to share in the outstanding investment performance of the funds."

The failure to increase the multiplier for petitioners and other persons who retired before July 1, 2001, violated the equal protection clause. Such failure was arbitrary and distributed a benefit unequally. As the Act expressly found, the increase in the multiplier was due to outstanding returns on the contributions of petitioners and other retirees before May 17, 2001, and contributions by employers for their benefit as

part of their compensation.

The actuarial value of the increase in benefits to members of PSERS retiring after July 1, 2001, was $5.02 billion. The actuarial value of the increase in benefits to members of SERS retiring after July 1, 2001, was $3.214 billion.

Thus, the actuarial value of both increases was $8.234 billion. After the increases, the systems were still overfunded in the amounts $4.45 billion [PSERS] and $3.225 billion [SERS].

REASONS FOR GRANTING THE WRIT

This court should review the question whether Act 9 violates the Equal Protection clause because a state court of last resort has decided an important question of constitutional law that conflicts with two decisions of this court, *Zobel v. Williams*, 457 US 55 (1982); *Hooper v. Bernalillo County*, 472 US 612 (1985).

Legislation that confers economic benefits must do so equally. *Zobel* required that dividends generated by sale of oil be distributed to citizens of Alaska equally. *Hooper* required tax exemptions to be given to all Vietnam veterans.

Act 9 classifies retired members of PSERS and SERS into two classes: those, including petitioners, who retired before July 1, 2001; and, those who retire on or after July 1, 2001.

Act 9 violates equal protection and the Commonwealth Court decision conflicts with *Zobel* and *Hooper* because the favored class received $8.234 billion of the overfunding of PSERS and SERS, whereas the disfavored class received none.

State interest

Act 9 arose from the recognition that the pension funds had become overfunded and that the employers had dramatically benefitted by decreased contributions. Employees had over contributed and should be provided with additional benefits, allowing "them for the first time to share in the outstanding investment performance of the funds." There was also recognition that employees had been short-changed by receiving only 4% interest when market rates were higher.

The purpose of Act 9 was to benefit members whose past contributions had provided the capital which had grown in value. As of May 17, 2001, no dollar contributed by a member of the common funds was distinguishable from a dollar contributed by any other member. Accordingly, all members were equally entitled to share in the special dividend of $8.234 billion. Certainly, a dollar contributed by a member intending to retire on July 1, 2001, was indistinguishable from a dollar contributed by a member intending to retire on June 30, 2001.

There was no hint of legislative intent to benefit the state or school district employers, but only to do

equity to employees who had not realized any benefit from investment returns "well in excess of expectations." The legislature expressly recognized that the employers had already received their fair share of the benefit.

Pennsylvania was not the only state that had a surplus in its public employee retirement funds in 2001. By act approved June 29, 2001, New Jersey shared its surplus with all members of its Teachers' Pension and Annuity Fund and the Public Employees' Retirement System. New Jersey Chapter 133, P.L. 2001. Equal treatment under the law required no less. The consequence was a 9.09% increase for all members, past and future retirees.

Commonwealth Court's distinctions

That some members who retire after July 1, 2001, increase their contributions 1.25% is inconsequential in relation to the $8.234 billion benefit conferred on all such retirees.

An employee who retired on July 1, 2001, received a 25% larger annuity than an employee who retired before the effective date of Act 9. The higher contribution rate did not go into effect until January 2002, so employees who retired during the first six months after Act 9 became effective never contributed at the higher rates.

The legislative history assumed that the number of retirements in the year following enactment of the

changes would be *double* the normal number.

An employee who retires today will have contributed $500 - $1,000 extra dollars since January 2002, but will receive thousands of extra dollars every year for life.

The Commonwealth Court's rationale would be logical if the increases in future benefits corresponded to increases in future contributions, that is, if future retirees were given the benefit of their higher future contributions. But, it is illogical to give future retirees the exclusive benefit of $8.234 billion overfunding arising from past contributions.

PSERS and SERS were defined benefit plans before and after Act 9. Act 9 redefined the benefit by increasing it 25% for retirees on or after July 1, 2001. It is undisputed that neither class bears investment risk because the two factors determining the amount of benefits are length of service and average salary over the last three years. Accordingly, the Commonwealth Court erred, 834 A.2d at 660, in referring to contributing members "sharing investment risks." Investment risks are borne by the employers, whose contribution rates fluctuate with the performance of PSERS and SERS.

Act 9's change from 20 year amortization to 10 year amortization of underfunded values is irrelevant to who got the $8.234 billion overfunding. The change in amortization rate speeds up employers obligation to cure any underfunding. Such change was

precautionary, because, before Act 9 was adopted, PSERS and SERS were overfunded by $15.91 billion, and after Act 9, they were overfunded by $7.675 billion.

Respondents' rationale

Respondents said the increase in benefits was enacted to retain and attract the most qualified candidates.

The increase in benefits was not enacted to retain or attract employees. The purpose of Act 9 was to share the surplus in PSERS and SERS with members. Before, only employers benefitted from the unexpected excess investment returns.

Government taxes the things it wants less of and subsidizes the things it wants want more of. The consequence of increasing annuities is more retirements.

The legislature understood that Act 9 would increase retirements. Act 9, § 1(5), refers to a report of the Public Employee Retirement Commission of May 7, 2001, which incorporated a letter from an actuarial advisor to the Commission. The letter says:

> "Since the legislation would significantly increase retirement benefits for most active SERS members, for purposes of this cost estimate, we have assumed that the number of retirements in the year following enactment of the changes would be

double the number normally applicable (emphasis supplied)."

In 1991 and 1992, the legislature increased annuities as an incentive for state and public school employees to retire ("the Mellow incentive"). 71 Pa.C.S. § 5302(c); 24 Pa.C.S. § 8302(b.2). The purpose of the Mellow incentive was to encourage employees to retire earlier than they intended to. 1992 Pennsylvania Legislative Journal--House at 1847 (Representative Cowell, speaking).

Zobel noted that the Alaska statute in question was likely to have the opposite effect of its intention to attract and keep newcomers to the state, since they would always receive less than those who resided in the state longer. 457 US at 62, n.9.

Hooper held that a 1983 New Mexico statute that granted a property tax exemption to Vietnam War veterans who established residency in the state before May 8, 1976, bore no rational relationship to the asserted state interest of encouraging veterans to move to New Mexico. *Hooper* found the legislature could not plausibly encourage veterans to move to New Mexico when the triggering date of the tax exemption had long passed.

Zobel and *Hooper* support the proposition that a statute creating economic classifications is irrational when it is likely to have the opposite effect than the purported reasons for its enactment.

Like the statutes in *Zobel* and *Hooper*, Act 9 will have the opposite effect of retaining and attracting teachers and other state employees--it was foreseen to *double* the number of retirements the next year.

The effect of Act 9 was to misappropriate the surplus earned from the contributions of retirees and by their employers on their behalf, to those soon to retire.

The legislators and the governor who enacted Act 9 had direct, personal, substantial, pecuniary interests. By misappropriating all the surplus funds to members who retire after July 1, 2001, the legislators and the governor enriched themselves.

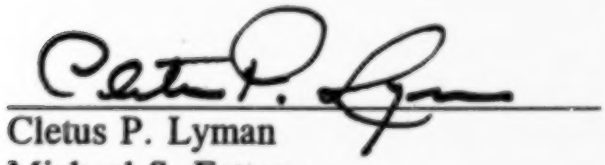
Romer v. Evans, 517 US 620, 633 (1996), implicitly held that improper motivation for the adoption of a law on the part of the lawmakers required heightened judicial scrutiny. *Romer* struck down a proposition approved by the voters of Colorado, prohibiting a class of persons from seeking legislative protection. *Romer* said the "laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."

Conversely, Act 9 gives rise to the inevitable inference that the benefit conferred is born of the direct, personal, substantial, pecuniary interests of the lawmakers.

Conclusion

Petitioners ask the court to grant their petition for a writ of certiorari to review the October 21, 2003, judgment of the Commonwealth Court of Pennsylvania, affirmed September 22, 2004, by the Supreme Court of Pennsylvania.

Respectfully submitted,



Cletus P. Lyman
Michael S. Fettner
LYMAN & ASH
1612 Latimer Street
Philadelphia, PA 19103
(215) 732-7040

Counsel for Petitioners

ORDER OF SUPREME COURT OF PENNSYLVANIA

Patricia Donahue, Madeleine F. Pierucci,

Appellants,

v.

Public School Employees' Retirement System of the Commonwealth of Pennsylvania, Board of Trustees of the Public School Employees' Retirement System of the Commonwealth of Pennsylvania, State Employees' Retirement System of the Commonwealth of Pennsylvania, Board of Trustees of the State Employees' Retirement System of the Commonwealth of Pennsylvania, Honorable Barbara Hafer, Treasurer of the Commonwealth of Pennsylvania and Chair of the Board of Trustees of the Public School Retirement System of Pennsylvania, Nicholas J. Maiale, Chair of the Board of Trustees of the State Employees' Retirement System,

Appellees.

No. 267 MAP 2003

SUPREME COURT OF PENNSYLVANIA

Appeal from the final order of the Commonwealth Court dated October 21, 2003, at No. 325 MD 2003

858 A.2d 1162; 2004 Pa. LEXIS 2171

PER CURIAM ORDER Decided: September 22, 2004

The Order of the Commonwealth Court is hereby AFFIRMED.

DECISION OF COMMONWEALTH COURT OF PA

Patricia Donahue, Madeleine F. Pierucci,

Petitioners,

v.

Public School Employees' Retirement System of the Commonwealth of Pennsylvania, Board of Trustees of the Public School Employees' Retirement System of the Commonwealth of Pennsylvania, State Employees' Retirement System of the Commonwealth of Pennsylvania, Board of Trustees of the State Employees' Retirement System of the Commonwealth of Pennsylvania, Honorable Barbara Hafer, Treasurer of the Commonwealth of Pennsylvania and Chair of the Board of Trustees of the Public School Retirement System of Pennsylvania, Nicholas J. Maiale, Chair of the Board of Trustees of the State Employees' Retirement System,

Respondents.

No. 325 M.D. 2003

COMMONWEALTH COURT OF PENNSYLVANIA

September 10, 2003, Argued
October 21, 2003, Decided
October 21, 2003, Filed

834 A.2d 655; 2003 Pa. Commw. LEXIS 752

JUDGES: JAMES GARDNER COLINS, President Judge, DORIS A. SMITH-RIBNER, Judge, DAN PELLEGRINI, Judge, ROCHELLE S. FRIEDMAN, Judge, BONNIE BRIGANCE LEADBETTER, Judge, RENEE L. COHN, Judge, MARY HANNAH LEAVITT, Judge. OPINION BY

JUDGE LEADBETTER. Judge Smith-Ribner concurs in the result only. CONCURRING OPINION BY JUDGE FRIEDMAN.

OPINION BY: BONNIE BRIGANCE LEADBETTER
[*657] OPINION BY JUDGE LEADBETTER

Patricia Donahue and Madeleine F. Pierucci, retired public school teachers, filed a petition for review in our original jurisdiction asserting a class action for a judgment declaring unconstitutional the 2001 amendments to the Public School Employees' Retirement Code, *24 Pa.C.S. §§ 8101-8535*, and the State Employees' Retirement Code, *71 Pa.C.S. §§ 5101-5956*. Donahue and Pierucci assert that the Act of May 17, 2001, P.L. 26 (Act 2001-9) discriminates against persons who retired before the Act's effective date of July 1, 2001, because it does not afford them the same increase in retirement benefits provided to those persons still employed and contributing to the respective retirement systems. Presently before the court are the preliminary objections of the respondents, the two retirement systems, their boards of trustees, Barbara Hafer as Commonwealth Treasurer and the Chair of the Board of Trustees for the Public School Employees' Retirement System (PSERS) and Nicholas J. Maiale, Chair of the Board of Trustees for the State Employees' Retirement System (SERS). Respondents assert a demurrer and challenge the standing of the two retired teachers to challenge the amendments to the State Employees' Retirement Code.

Donahue and Pierucci retired in 1999 after each of them had worked as public school teachers for more than thirty years. They began receiving annuity benefits according to the statutory provisions then in effect. In

2001, the legislature enacted Act 2001-9, amending both the Public School and State Employees' Retirement Codes to allow current employees to increase the amount of their contributions and receive an increased amount upon retirement. n1 [*658] Upon election to the new class, the employees' prior service is credited under the new membership class. Members of either system who retired before the effective date of the Act are not eligible to elect a new class of membership.

> n1 Act 2001-9 created a new membership class in the Public School Employees' Retirement System known as class T-D. New and active members of the System could elect class T-D membership prior to the date specified in the Act. Following such an election, the employee's contribution increased from 5% to 6.25% and the multiplier applied to the member's final average salary in order to calculate his retirement annuity increased from 2 to 2.5 resulting in a benefit increase of approximately 25%. Act 2001-9 similarly amended classes of service in the State Employees' Retirement System to permit an election that resulted in increased contributions and an increased benefit at retirement.

In their complaint, Donahue and Pierucci, pointing to the statute's policy statement, contend that the legislature amended the retirement systems in order to share with members the unexpectedly good investment earnings that the systems had recently enjoyed. n2 They further assert that the amendments arbitrarily fail to include members who retired prior to July 1, 2001, in the scheme for achieving this purpose and, thereby, violate the due process

provision of the Pennsylvania Constitution and the equal protection provisions of both the State and federal Constitutions. Donahue and Pierucci request a declaration that Act 2001-9 is unconstitutional insofar as it fails to provide additional benefits for members that retired before July 1, 2001 and an order directing a 25% increase in their annuities with interest on the amount due retroactively. The State respondents filed preliminary objections, contending that the petition fails to state a claim under either the due process or equal protection provisions of the Pennsylvania and United States Constitutions. n3

n2 Section 1(2) of Act 2001-9 states:

> Over the past two decades, both pension funds have experienced investment returns well in excess of expectations. As a result, State and school district contributions have decreased dramatically to less than 1% of payroll for next year. At the same time, employee contributions range from 5% to 6.25% of payroll. The outstanding investment performance has resulted in the pension funds being over 123% funded, compared to current needs. The 4% statutory interest rate the employees receive on their pension accounts has consistently been eclipsed by the actual average returns of the funds over the last two decades and also has been less than available private market interest rates. The fact that employees have been and are projected to continue to contribute at a rate that is materially greater than the employers due to the more than 100% funded status of the plans raises the issue of the extent to which employees should be provided additional

benefits. The increase in benefits for State and school district employees provided herein will in effect allow them for the first time to share in the outstanding investment performance of the funds. To date, that experience has only benefited the employers through reduced contributions to the funds. Even with the increases in benefits provided herein, both pension funds are projected to maintain minimal employer contribution rates and at the same time maintain a fully funded status. For at least the next decade, members are projected to continue to contribute at a rate substantially in excess of that required from employers.

n3 Respondents also contend that complainants, who are members of the Public School Employees' Retirement System, lack standing to challenge amendments to the State Employees' Retirement System. While we note that this objection is well-founded, we need not address this issue in light of our decision on the demurrer.

Any lawfully enacted legislation enjoys a presumption of constitutionality which can be overcome only if the challenger establishes by a clear, palpable, and plain demonstration that the statute violates a constitutional provision. James v. [*659] *Southeastern Pennsylvania Transp. Auth., 505 Pa. 137, 142, 477 A.2d 1302, 1304 (1984)* [citing *Milk Control Comm'n v. Battista, 413 Pa. 652, 659, 198 A.2d 840, 843 (1964)* and *Singer v. Sheppard, 464 Pa. 387, 393, 346 A.2d 897 (1975)]*. Where the challenge is on equal protection grounds, we must first determine the level of scrutiny which should be applied to

the classification at issue. As has repeatedly been noted:

> There are three different types of classifications calling for three different standards of judicial review. The first type--classifications implicating neither suspect classes nor fundamental rights--will be sustained if it meets a "rational basis" test. In the second type of cases, where a suspect classification has been made or a fundamental right has been burdened, another standard of review is applied: that of strict scrutiny. Finally, in the third type of cases, if "important," though not fundamental rights are affected by the classification, or if "sensitive" classifications have been made, the United States Supreme Court has employed what may be called an intermediate standard of review, or a heightened standard of review.

James, 505 Pa. at 145, 477 A.2d at 1305-06 (citations omitted). The three-tiered standard for reviewing equal protection claims is the same under both State and federal Constitutions. *Id. at 144, 477 A.2d at 1305.*

Harper v. State Employees' Retirement System, 538 Pa. 520, 649 A.2d 643 (1994) and *Rybak v. State Employees' Retirement Board, 154 Pa. Commw. 586, 624 A.2d 286 (Pa. Cmwlth. 1993), aff'd., 538 Pa. 476, 649 A.2d 431 (1994),* involved claims quite similar to those brought here, specifically, equal protection challenges to amendments to the pension system under which different classes of State legislators were subject to different levels of contributions and benefits based upon their dates of service. Both this court and our Supreme Court found the rational basis test to be the correct standard for such an

inquiry. n4 Nonetheless, Donahue and Pierucci assert that we should subject Act 2001-9 to strict scrutiny because the legislators demonstrated personal bias in enacting amendments to SERS that in part increased their own benefits. We disagree. This was no less the case in *Harper* and *Rybak*. Moreover, the legislation at issue here burdens neither a fundamental right nor a suspect class and the fact that the legislators, as the only body authorized to do so, n5 enacted changes in the retirement system in which they participate provides no basis for heightened judicial scrutiny.

n4 The court in *Harper* specifically disavowed the equal protection analysis voiced by the three judge plurality opinion in *Klein v. Commonwealth, State Employees' Retirement System, 521 Pa. 330, 555 A.2d 1216* (1989), instead quoting with approval the concurring opinion of Chief Justice Nix. *Harper, 538 Pa. at 524-25, 649 A.2d at 644-45*. Thus petitioners' reliance on *Klein* is misplaced.

n5 *Under Article II, § § 1* and *8 of the Pennsylvania Constitution*, the legislature is vested with the sole power to amend the retirement codes and is vested with sole authority to establish the compensation for its own members.

Thus we turn to the applicable test, whether the legislature had a rational basis for applying the amended retirement plans only to those currently in service and not to those already retired. Donahue and Pierucci challenge Act 2001-9 on the ground that it institutes a scheme for

distribution of outstanding earnings on pension fund contributions to which they and other retirees contributed and, therefore, deserve to share. However, the amendments [*660] effect a change not only in the distribution of benefits but also in the level of contributions by those members electing to participate in the new classes of service. As the General Assembly states in Section 1 of Act 2001-9, the amendments are designed to allow contributing members to increase their share of participation in the investment performance of the funds by increasing their contributions and to spread the funds' investment gains or losses over a shorter time frame of ten rather than twenty years. *See* Section 1(2) and (3) of Act 2001-9. n6 These goals serve a legitimate State interest in affording contributing members an opportunity to share in investment risks while maintaining sound funding strategy. *Cf. Harper, 538 Pa. at 526, 649 A.2d at 645-46.* Limiting participation in the new service classes to only those members actively employed and contributing is a rational means of achieving the legislative objectives. The new classes of service and the regulations pertaining thereto do not violate equal protection guaranties under either the federal or State Constitutions.

n6 Section 1(3) of Act 2001-9 states:

> A major change in the manner in which benefits are funded is warranted. Currently, gains or losses related to the funding for benefits are spread over a 20-year time frame. Under this proposed change, these gains or losses will now be spread over a shorter time frame, that being ten years, increasing intergenerational equity by reducing the time

elapsed between the service of the members of the systems and the related funding. A similar policy was enacted in 1991 when 30-year funding for the two funds was reduced to 20-year funding.

Accordingly, the respondents' preliminary objection in the nature of a demurrer is sustained and the petition for review is dismissed. n7

n7 Inasmuch as Donahue and Pierucci cannot prevail in their contention that the amendments to PSERS and SERS under Act 2001-9 violate either the federal or State Constitutions, we need not address respondents' argument that the federal constitutional claims can only be pursued in an action pursuant to *42 U.S.C. § 1983*.

BONNIE BRIGANCE LEADBETTER, Judge

Judge Smith-Ribner concurs in the result only.

ORDER

AND NOW, this 21st day of October, 2003, the preliminary objection in the nature of a demurrer to the petition for review in the above captioned matter is hereby SUSTAINED and the petition for review is DISMISSED.

BONNIE BRIGANCE LEADBETTER, Judge

CONCUR BY: ROCHELLE S. FRIEDMAN

CONCURRING OPINION BY Judge FRIEDMAN

I concur in the result. However, it is a long-standing principle that courts should not address a constitutional question if the case can be decided on non-constitutional grounds. *West v. Hampton Township Sanitary Authority, 661 A.2d 459 (Pa. Cmwlth. 1995)*. Instead of addressing the constitutional question here, I would decide the case on the standing issue, dismissing the petition for review because the retirees lack standing to challenge the 2001 amendments to the Public School Employees' Retirement Code, *24 Pa. C.S. § § 8101-8535*.

ROCHELLE S. FRIEDMAN, Judge